BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VILMA M. CALDERON	)	
Claimant	)	
	)	
VS.	)	
	)	DOCKET NOS. 234,545
IBP, INC.	)	234,991
Self-Insured Respondent	)	256,583
	)	259,081

ORDER

Claimant requested review of the March 6, 2003 Award of Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on August 20, 2003.

The Director of the Division of Workers Compensation app------ointed Jeffrey K. Cooper of Topeka, Kansas to serve as Board Member Pro Tem in place of Gary M. Korte who recused himself from this proceeding.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas appeared for the claimant. Wendel W. Wurst of Garden City, Kansas appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) issued an Award on March 6, 2003, awarding claimant a functional impairment of 13.5 percent to the body as a whole based upon the opinions of Terrence Pratt, M.D., the court-appointed independent medical examiner. The ALJ declined to award any work disability finding that claimant had been terminated for cause as she had violated respondent's attendance policy. Further, Judge Fuller concluded that claimant failed to establish she had made a continued good faith effort to find appropriate employment after she was terminated from respondent's employ. Thus, she was not entitled to work disability pursuant to K.S.A. 44-510e(a).

The claimant contends the ALJ's Award is contrary to the evidence contained within the record and that claimant is entitled not only to an increased functional impairment of 24 percent but is also entitled to work disability of not less than 72.2 percent.

Respondent filed no formal brief, instead relying upon their submission letter to the ALJ but at oral argument made it clear that the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

Claimant was hired by respondent in 1997. Her primary language is Spanish but she is able to communicate in a limited way in English both verbally and in writing. During the course of her employee orientation, claimant was advised of the respondent's procedures with respect to absences and the need to call in 30 minutes before the time an employee is to report to work in order to avoid any assessment of points. This procedure was not only explained to claimant but is posted within the respondent's plant in four separate languages. If an employee accumulates 14 points in a 12 month period, that is grounds for termination.

Over the course of her employment with respondent, claimant had been assessed points for either showing up late or for her failure to call before her shift. On several occasions Pat Sanders, the Human Resources Manager, would discuss the matter with the claimant and depending on claimant's explanation, the points would be removed from her record. Ms. Sanders would, in these instances, remind claimant of the attendance policy and the need to call in daily when claimant was absent.

These claims apparently arise out of a series of injuries with two specific accidents, the first occurring in August of 1997 and the second in July of 1998. For purposes of simplicity, the parties have stipulated that the date of accident for each of the docket numbers is August 29, 2000.

In August of 1997 claimant was pulling a carcass and experienced pain in her right scapular area. This was found to be a compensable event by respondent and treatment was provided. Claimant was referred to an occupational health facility and treated conservatively. This included manipulative therapy to the thoracic spine and trigger point injections along with medication. There was also a nerve conduction study done to her upper extremities for bilateral arm complaints. Following an MRI to the cervical and thoracic areas, claimant was advised she had some mild degenerative changes at C3-4 and C4-5 and she returned to work.

Then in July of 1998, claimant was cutting tails, a job that required her to repetitively cut the tails off the carcass and throw them with her right hand into an area in front of her. She testified this activity aggravated her right scapular area. Again, she received conservative treatment although she contends that none of these efforts improved her condition.

At the suggestion of her attorney she sought out Pedro Murati, M.D. for an evaluation. Dr. Murati saw claimant on September 29, 1998. At this point, her complaints were to both shoulders, particularly her left upper extremity and pain in the mid and low back. He diagnosed strains to both shoulders, the thoracic and lumbosacral areas along with left ulnar cubital syndrome. He recommended a TENS unit as well as trigger point injections, bone scan and a repeat nerve conduction study.

Armed with this report, claimant requested further treatment. Respondent voluntarily provided the TENS unit but denied the trigger point injections. Following a preliminary hearing, the ALJ entered an Order directing respondent to provide the injections recommended by Dr. Murati.

Thereafter, respondent directed claimant to see C. Reiff Brown, M.D., for an evaluation. Dr. Brown saw claimant in August of 1999 and indicated claimant describes her two separate injuries have left her with pain and tenderness in the upper trapezius bilaterally but most prominently in her left scapular area with radiating pain down her back to the lumbar area. This discomfort is aggravated by increased use of her arm or back and by remaining in one position for long periods of time. During his examination, he noted her normal range of motion in the cervical spine and in both shoulders. He noted no crepitus nor any atrophy of her musculature. Her sensory and motor function of her upper extremities was normal and the Tinel, Phalen and Finkelstein signs were all negative.

According to Dr. Brown, claimant has a chronic strain or sprain of the thoracic musculature. He went on to say that continued physical therapy mobilization, trigger point injections or anti-inflammatories would be of no help as claimant denied any benefit from any of those modalities. Indeed, he indicated she needs to keep working because her work activities do not seem to increase her symptoms. He concluded that claimant should be able to continue performing her job of driving cattle without exceeding any of the following restrictions: "no lifting above 30 pounds occasionally, 20 pounds frequently, no pushing or pulling over 50 pounds." (Brown depo. p.11). Dr. Brown also assigned a 5 percent permanent partial impairment to the body as a whole, finding claimant's condition to fall in the DRE Thoracolumbar Category II level.

Dr. Murati saw claimant a second time on October 12, 1999. Claimant presented with complaints of mid and low back pain, left upper extremity pain and numbness of the left hand. He concluded claimant was suffering from right shoulder pain with mild AC joint crepitus, left shoulder pain with moderate glenohumeral joint crepitus, left ulnar cubital

syndrome and thoracic and lumbosacral strain with a resulting loss of motion. He recommended permanent work restrictions which included no climbing of ladders, crawling, heavy grasp with the left, no work above shoulder level with either arm and no work more than 18 inches from the body for either arm. He also recommended only occasional bending, climbing stairs, squatting and repetitive left hand grasp. Finally, he assessed weight restrictions of 20 pounds only occasionally, up to 10 pounds frequently and 5 pounds constantly. Utilizing the task list provided by Jim Molski, Dr. Murati testified that claimant had a 44 percent task loss, losing the ability to perform 4 of the 9 tasks itemized by Mr. Molski.

He also assigned a permanent impairment rating pursuant to the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment,* (Guides), Fourth Edition. According to Dr. Murati, claimant bears a combined total impairment of 24 percent to the body as a whole. This includes a 2 percent impairment[1] for the thoracic strain plus another 2 percent for the loss of range of motion. In addition, there is an additional 2 percent for the right upper extremity and an additional 13 percent for the left.

Dr. Brown saw claimant again on March 22, 2000. Claimant's complaints of discomfort around the left scapular musculature continued and she expressed a gradual increase in the severity of her overall symptoms when compared to his earlier examination of her. Dr. Brown found claimant's condition unchanged from his previous exam. In fact, he indicated he was unable to explain the continuation of her symptoms. Dr. Brown confirmed his belief that she bears a 5 percent permanent partial impairment to the body as a whole, that she was at maximum medical improvement and that his prior restrictions should continue.

With respect to the claimant's alleged task loss, Dr. Brown opined that claimant's task loss was 11 percent when utilizing Jim Molski's vocational task analysis. Utilizing Karen Terrill's task list, Dr. Brown indicated her task loss was 22 percent.

Pursuant to Court Order, an independent medical examination was ordered and Terrance Pratt, M.D. was directed to examine claimant. Claimant was assisted by an interpreter and presented to Dr. Platt on November 9, 2001 with complaints of generalized spinal, bilateral upper extremity and left knee discomfort. Following a review of the pertinent medical records, he took a history from the claimant and performed an examination. He found that claimant had basically normal shoulder range of motion and he failed to find any objective findings that would support a diagnosis of carpal tunnel syndrome or cubital tunnel syndrome. Based upon his findings and the medical records, he diagnosed claimant with a history of cervical sprain/strain with mild spondylosis, thoracic sprain/strain with mild degenerative

[1] Each of these percentages is reflected as a whole body impairment unless otherwise noted.

changes, bilateral shoulder syndrome with left AC joint degenerative disease and left knee discomfort without specific findings.

Following his examination, Dr. Pratt assessed a total 11 percent permanent partial impairment. This figure is comprised of 5 percent for cervical involvement (half of which he found was pre-existing), 5 percent for the thoracolumnbar involvement along with 2.5 percent to the right upper extremity (shoulder) 6 percent to the left upper extremity (with 2 percent pre-existing). When converted and combined, the rating is 11 percent as evidenced by Dr. Pratt's December 4, 2001 letter and his deposition testimony. (Pratt depo. p.24-25). He also imposed restrictions to avoid overhead activities on a frequent basis, avoid lifting overhead in excess of 25 pounds occasionally and a maximum lifting recommendation of 35 pounds occasionally with frequent lifting of up to 20 pounds. It is clear from Dr. Pratt's testimony that claimant's pre-existing cervical condition was not symptomatic prior to her employment with respondent but was aggravated by her work activities since 1997. However, he chose to deduct that from his overall impairment rating.

During the course of his deposition, Dr. Pratt was also asked to comment on claimant's task loss. Based upon the task list prepared by Mr. Molski, Dr. Pratt opined that claimant would be unable to do 1 and possibly 3 of the 9 itemized tasks. The variability was owing to whether the task required claimant to do the task frequently and/or involved working overhead. If so, then the task was prohibited under his restrictions. He was also asked to review Ms. Terrill's list of 9 tasks. Dr. Pratt testified that of the 9 tasks itemized, claimant was prohibited from 1 and possibly 2 tasks, depending on whether the task required overhead movement.

Up until March 16, 2001, claimant was employed by respondent as a cattle driver, a position that was within the physicians' restrictions. In late February, 2001, claimant sought out Pat Sanders and asked for a 2 week leave from work as she wanted to go to California to seek treatment for her back. Respondent understood claimant was going to see a doctor for her work-related complaints. Claimant indicated she had an appointment with a doctor on March 7, 2001. Ms. Sanders agreed to give claimant one week off beginning March 2 and ending March 12, 2001. In order to do this, Ms. Sanders advised claimant she would need to provide proof of the doctor's appointment in California upon her return.

Before this leave took effect, claimant called in sick on February 26, 2002. Then on February 27, 2001, she was directed to appear for an examination. However, the weather prevented her from traveling to the doctor. Claimant called the personnel department and explained the situation. She was told to stop by the personnel office the next day to complete the leave of absence papers. On February 28, 2001 claimant called in sick. Again, she was told to come in and sign the papers for her leave of absence. On March 1, 2001 claimant again called in sick. Later that day she went to the plant to pick up her check. On that date she completed the necessary paperwork for her leave. At this point,

claimant had not provided any paperwork indicating she was to be seen by a doctor on March 7, 2001. Nonetheless, the leave of absence was granted and claimant was to return on March 12, 2001.

Claimant testified that she was told that if she needed the second week off of work, to take it. There is nothing within the record that substantiates this fact. Claimant did call the personnel office on March 8, 2001 and spoke to Rosie Acosta, advising her that the doctor wanted to see her again on March 12th and as a result, she would not be back as originally planned. On March 13, Ms. Sanders indicated that there had been no further word from claimant and as a result, claimant's absences were unexcused. Pursuant to the attendance policy, her points exceeded the 14 necessary for termination. Thus, on March 15, 2001, claimant was terminated from respondent's employ.

On March 19th, claimant called in to the personnel office and spoke with Ms. Sanders, with the aid of an interpreter. Claimant had returned to Garden City on March 16th and knew that she would need to speak to someone about her absences. As a result, she did not report to work on the 19th nor did she call in prior to her shift as is normally required. When she did call, she was told she had been terminated. Ms. Sanders invited claimant to visit the personnel department to discuss the matter.

On March 20, 2001, claimant appeared at the plant. She produced a doctor's release from a clinic in California that appears to evidence a doctor's appointment on March 20 and 27, 2001 and an off work slip covering the period of March 12-27, 2001. There is no evidence of any physician's appointment on March 7. Following a discussion about the need to have called in while absent, Ms. Sanders invited claimant to explain the absences in an effort to reinstate her to her job. Ms. Sanders offered the assistance of a bilingual employee who could help in preparing this document. Claimant declined the offer and indicated she would prepare the document herself. No such document was received until months later.

Since her termination, claimant has obtained employment with various employers, beginning in November of 2001. She has worked in Fort Smith, Arkansas at four different chicken plants where she was paid $7.25 per hour, working 40 hours per week. She has worked a total of 5 months since March of 2001. Of these different employers, the longest she held a job was for two months. In two instances, she only worked for a single day then quit. According to claimant, these jobs were repetitive and caused her increased pain.

The ALJ apparently was most persuaded by Dr. Pratt's opinions and found a 13.5 percent permanent partial impairment to the body as a whole. This is 2.5 percent higher than that indicated by Dr. Pratt because he deducted that amount from his overall impairment for what he believed was pre-existing in claimant's cervical area. While it may well have been pre-existing, this condition was asymptomatic and had not caused claimant any demonstrable difficulties, at least based on the record presented. Accordingly, no

deduction should have been made and the ALJ appropriately included the 2.5 percent in the overall impairment. The Board finds this to be supported by the record and affirms the 13 permanent partial impairment.

The Board concurs with the ALJ's analysis regarding work disability. Claimant's wage loss is not due to her work related injuries but rather resulted from her termination for violation of respondent's attendance policy. See *Perez v. IBP, Inc.* 16 Kan. App.2d 277,826, P.2d 520 (1991). Claimant knew of the attendance policy and procedures since 1997. When she left on her trip to California, she knew she had to return by March 12. She failed to do so and did not call in as required. When she did return she failed to produce any documentation evidencing a physician's appointment on March 7, the date she was first supposed to be seen, to justify the week long leave of absence from work. In fact, other than a card reflecting an appointment for March 20th and 27, 2001, and a generic "off-work "slip, there is little evidence claimant was even treated by a doctor while in California.

The Board is not persuaded by claimant's argument that she was terminated for absences stemming from her work-related injury. While it is certainly the public policy of the State of Kansas to prohibit employers from discharging an employee for absences due to industrial injuries, see *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), that does not make an employee immune from the rules of the work place. In this instance, respondent had a long standing policy of requiring its employees to call in 30 minutes before a shift to report an absence. If an employee failed to do so, points were assessed. If 14 or more points are accumulated within a 12 month period, termination is warranted. Claimant was well aware of this policy and had been routinely counseled on this issue prior to March of 2001.

Before March 1, 2001, claimant had accrued 7 ½ points for either being tardy, non-work related illnesses, personal business or family emergencies. Her leave of absence began March 1, 2001 and was to end on March 12, 2001, when she was to return to work. Her call to the personnel office on March 8 indicated the doctor wanted to see her again on March 12, 2001. This delay was not approved by respondent nor was there any documentation provided to respondent to evidence any such appointment. When claimant did not appear for work on March 12, she was assessed 3 points. The same happened on March 14 and 15. At this point, claimant had accrued 16 ½ points and was terminated. The Board concurs with the ALJ's finding that claimant's termination was due to claimant's violation of the attendance policy and not due to her work-related injury. Thus, claimant is not entitled to any work disability under K.S.A. 44-510e(a) and based upon the rationale set forth in *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge Pamela J. Fuller dated March 6, 2003 is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director